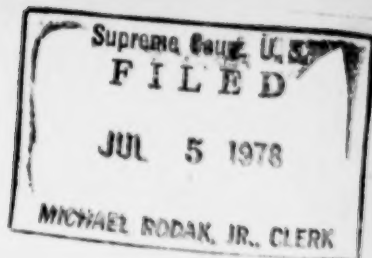


No. **78-203**



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

LANDON B. SNAPP

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

Petition for a Writ of Certiorari to the

United States Court of Appeals

for the Sixth Circuit

DALE QUILLEN
95 White Bridge Road
Nashville, Tennessee
Attorney for Petitioner

OPINION BELOW

There was no formal opinion of the District Court. Requested Instruction No. 7 and No. 8 are reproduced in Appendix B to this Petition.

No opinion was rendered by the Court of Appeals; its order affirming the judgment of conviction is set forth in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 1978 (infra., Appendix A). On May 25, 1978, Mr. Justice Potter Stewart signed an order extending the time for filing this Petition for Writ of Certiorari to and including June 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the jury should have been instructed that a violation of 21 U.S.C. §841(a)(1) includes the lesser offense

of distributing or dispensing a controlled substance in violation of 21 U.S.C. §829.

STATUTES AND REGULATIONS INVOLVED

Sections 829, 841(a) and 842(a) of Title 21, United States Code; and section 1306.04(a) Title 21, Code of Federal Regulations are set forth in Appendix C, infra.

STATEMENT OF THE CASE

Dr. Landon B. Snapp, II, was a medical doctor practicing in Nashville, Tennessee. He was indicted on November 9, 1976, for twenty-five (25) substantive violations of 18 U.S.C. §2, 21 U.S.C. §841(a)(1) and 21 C.F.R. §1306.04(a).

A jury trial was conducted from January 12 to 21, 1977, before the Hon. L. Clure Morton, District Judge for the Middle District of Tennessee. Three (3)

counts of the indictment were dismissed by the government. Petitioner was convicted upon the remaining counts and sentenced to four (4) consecutive four (4) year sentences.

REASONS FOR GRANTING THE WRIT

Petitioner submits that a violation of 21 U.S.C. §829 is a lesser included offense of an alleged violation of 21 U.S.C. §841(a)(1). If any person knowingly or intentionally distributes or dispenses a controlled substance, he has committed a prohibited act under 21 U.S.C. §841(a). Petitioner was so charged in the indictment. Furthermore, a physician who issues a prescription not in the usual course of professional treatment is subject to the penalties provided for violating the law relating to controlled substances 21 C.F.R. §1306.04(a). Petitioner was so charged in the indictment.

Rules governing the issuance, filling, and filing of prescriptions are set forth generally in 21 U.S.C. §829 and more specifically in 21 C.F.R. §1306 as so stated in the regulations. By charging petitioner with violations of the more specific rules as set forth in the regulation, clearly, petitioner has violated the general rules governing controlled substances as contained in 21 U.S.C. §829.

Failure to abide by the requirements of 21 U.S.C. §829 is declared unlawful in 21 U.S.C. §842 and appropriate penalties provided therein. Violations of 21 U.S.C. §842 are punished as misdemeanors while those involving 21 U.S.C. §841 lead to felony convictions.

The facts in this case and Petitioner's defense theory demand that the jury be instructed not only as to 21 U.S.C. §841(a)(1), but also as to the lesser included offense of violating 21 U.S.C. §829. In

United States v. Moore, 423 U.S. 122

(1975), this Court held that a physician could be prosecuted under 21 U.S.C. §841 (a)(1), enjoying no special exemption because of his status as a registrant. However, the Court reserved ruling on the issue as to whether Dr. Moore could have been prosecuted under §842(a)(1) for having violated the provisions of §829.

Reason dictates that prosecutions under 21 C.F.R. §1306.04(a) by definition involve 21 U.S.C. §829 and the jury should have been so instructed. In circumstances such as these, there exist grounds for the lesser included offense instruction. See, United States v. Thompson, 492 F.2d 359 (8th Cir. 1974). A Defendant in a criminal case is entitled to instructions to every theory which he puts forward and

and supports by evidence. United States v. Dye, 508 F.2d 1226 (6th Cir. 1974), cert. denied, 420 U.S. 974 (1975). The existence of a lesser included offense necessarily affected the theory of the defense and required an appropriate instruction, such as Requested Instruction No. 7.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
ATTORNEY FOR PETITIONER
95 White Bridge Road
Nashville, Tennessee

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APPENDIX A
77-5324

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,)	On Appeal from
)	the United
Plaintiff-Appellee,)	States District
)	Court for the
v.)	Middle District
)	of Tennessee.
LANDON B. SNAPP,)	
)	
Defendant-Appellant.)	<u>O R D E R</u>

Before: PECK, ENGEL and DEITH, Circuit
Judges.

Appellant Landon B. Snapp, a registered physician, was convicted by a jury of twenty-two (22) counts of unlawful distribution and dispensing of a controlled substance pursuant to prescriptions not issued for a legitimate medical purpose or in the usual course of professional practice, and one (1) count of conspiracy to distribute and dispense controlled

substances pursuant to prescriptions not issued for a legitimate medical purpose or in the usual course of professional practice in violation of 18 U.S.C. §2, 21 U.S.C. §§841(a)(1) and 846.

On appeal appellant alleges numerous errors. Appellant was indicted under 21 U.S.C. §841(a)(1). The various charges in the indictment also cited 21 C.F.R. §1306.04(a). Defendant argues that a violation of 21 C.F.R. §1306.04(a) is a violation of both 21 U.S.C. §841 and §829 which is punishable under 21 U.S.C. §842, and that therefore the jury should have been given a lesser included offense charge. We find no merit in this argument.

Further, upon review of the record, and consideration of the briefs and oral arguments of counsel, it is the opinion of this Court that there was substantial evidence to support the jury's verdict

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and that no prejudicial errors intervened.

IT IS THEREFORE ORDERED that the
judgment of conviction be and the same
hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

B-1

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA)
)
)
 v.) No. 76-226-
) NA-CR
 LANDON B. SNAPP)

REQUESTED INSTRUCTION NO. 7

The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the Court.

So, if the jury should unanimously find the accused "Not Guilty" of the crime charged in the indictment then the jury

must proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged.

The violation of Title 21, United States Code, §841(a)(1) which is charged in the indictment in this case, necessarily includes the lesser offense of distributing or dispensing a controlled substance in violation of Title 21, United States Code, §829. This lesser included offense is a violation of Title 21, United States Code, §842(a)(1). The regulations that the Attorney General is authorized to promulgate apply to the actual prescribing of a controlled substance that is the violation of Title 21, United States Code, §829. Therefore, if you find that the Defendant violated regulations set forth by the

Attorney General, but did not violate Title 21, United States Code, §842(a)(1).

The jury will bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of any lesser offense which is necessarily included in any crime charged in the indictment; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Devitt and Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS, 2d Ed., §1711 (1970)

United States v. Moore, 96 Sup. Ct. 335, 341 (1975) (21 U.S.C. §§841, 842 and 843 are parts of the same system of punishment)

United States v. Thompson, 492 F2d 359 (8th Cir. 1974) (General standards for lesser included offenses instruction)

Respectfully submitted,

/s/ Dale Quillen

/s/ William C. Wilson
Attorneys for Defendant

APPENDIX C

21 U.S.C. §829. PRESCRIPTIONS

(a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act. Prescriptions shall be retained in conformity with the requirements of section 307 of this title. No prescription for a controlled substance in schedule II may be refilled.

(b) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act. Such prescriptions may not be filled or refilled more than six (6) months after the date thereof or be refilled more than five (5) times after the date of the prescription unless renewed by the practitioner.

(c) No controlled substance in schedule V which is a drug may be distributed or dispensed other than a medical purpose.

(d) Whenever it appears to the Attorney General that a drug not considered to be a prescription drug under the Federal Food,

Drug, and Cosmetic Act should be so considered because of its abuse potential, he shall so advise the secretary and furnish to him all available data relevant thereto.

21 U.S.C. §841. PROHIBITED ACTS A —
PENALTIES

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally —

1) to manufacture, distribute, or dispense, or possess, with intent to manufacture, distribute, or dispense, a controlled substance; or . . .

21 U.S.C. §842. PROHIBITED ACTS B —
PENALTIES

(a) It shall be unlawful for any person —

1) who is subject to the requirements of part C (21 U.S.C.S §§821-8291) to distribute or dispense a controlled substance in violation of section 309 (21 U.S.C.S §829)..

21 C.F.R. §1306.04 PURPOSE OF ISSUE OF
PRESCRIPTION.

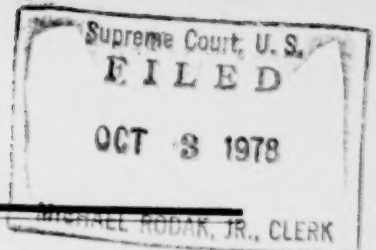
(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice). The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issu-

ing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

(b) A prescription may not be issued in order for an individual practitioner to obtain controlled substances for supplying the individual practitioner for the purpose of general dispensing to patients.

(c) A prescription may not be issued for the dispensing of (narcotic) drugs listed in any schedule for "detoxification treatment" or "maintenance treatment" as defined in Section 102 of the Act (21 U.S.C. 802).

No. 78-203



In the Supreme Court of the United States

OCTOBER TERM, 1978

LANDON B. SNAPP, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

In the Supreme Court of the United States

OCTOBER TERM, 1978

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LANDON B. SNAPP, PETITIONER

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner contends that he was entitled to a lesser-included offense instruction.

After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on 22 counts of unlawful distribution of a controlled substance, in violation of 21 U.S.C. 841(a)(1), and of conspiracy to commit that crime, in violation of 21 U.S.C. 846. He was sentenced to consecutive terms of four years' imprisonment and two years' special parole on three of the substantive counts. On the remaining counts, petitioner was sentenced to four years' imprisonment and two years' special parole, but the sentences were suspended on the condition that petitioner surrender his medical license and not apply for its return or practice

medicine during the five-year term of probation. The court of appeals affirmed per curiam on May 1, 1978 (Pet. App. A).¹

The evidence at trial showed that petitioner, a licensed physician, sold prescriptions for Didrex, a Schedule III controlled substance that can cause mood and emotional changes (Tr. 888) and can lead to drug dependency (Tr. 929), to persons who had received only minimal physical examinations (see, e.g., Tr. 223). Often one person would pick up prescriptions from petitioner for a number of other persons who were not present and had never been examined by petitioner (see, e.g., Tr. 224-226, 303). The pharmacy where most of the prescriptions were filled was the biggest customer for Didrex in central and western Tennessee, purchasing more of the substance than any single hospital, clinic, or wholesale drug company (Tr. 806). Didrex prescriptions constituted almost 60% of the prescriptions filled by that pharmacy during one six-month period, and all but one or two of its Didrex prescriptions during that period had been written by petitioner (Tr. 826).

Petitioner claims that the district court erred in refusing to give a lesser-included offense instruction (Pet. App. B) because the proof that he had written prescriptions for Didrex for an improper medical purpose could have supported a conviction for dispensing a Schedule III drug without a proper prescription, which is punishable as a misdemeanor under 21 U.S.C. 829(b), 842(a)(1) and

¹On May 25, 1978, Mr. Justice Stewart extended petitioner's time to petition for a writ of certiorari to and including June 30, 1978. The petition was filed on July 5, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court.

(c)(2)(A),² in addition to supporting a felony conviction under 21 U.S.C. 841.³ See *United States v. Moore*, 423 U.S. 122, 135-138 & nn.12, 13 (1975). The court of appeals correctly rejected this contention.

²21 U.S.C. 829(b) provides in pertinent part:

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act * * * may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act * * *.

21 U.S.C. 842 provides in pertinent part:

(a) Unlawful acts

It shall be unlawful for any person—

(1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title * * *.

(c) Penalties

* * * * *

(2)(A) If a violation of this section is prosecuted by an information or indictment which alleges that the violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall, except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than \$25,000, of both.

³21 U.S.C. 841 provides in pertinent part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance * * *.

(b) Penalties

Except as otherwise provided in section 845 of this title

It is well established that a "lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *Sansone v. United States*, 380 U.S. 343, 350 (1965). See also *United States v. Bishop*, 412 U.S. 346, 361 (1973); *United States v. Thompson*, 492 F. 2d 359, 362 (8th Cir. 1974). In this case there was no disputed factual element necessary to convict for dispensing a Schedule III controlled substance under 21 U.S.C. 841 but unnecessary to convict under 21 U.S.C. 842. The issuance of a prescription without a legitimate medical purpose constitutes dispensing under both 21 U.S.C. 841 and 21 U.S.C. 829, and 21 U.S.C. 842(c)(2)(A) (the misdemeanor provision of Section 842) sets forth the same scienter requirement as does 21 U.S.C. 841(a). Indeed, petitioner's proposed instruction (Pet. App. B) merely informed the jurors that, if they acquitted him of the Section 841 violation charged in the indictment, they should then consider whether he was guilty of a violation of Sections 829 and 842; it did not set forth any difference between the two offenses in respect to the quantum of proof necessary for a conviction.⁴ Accordingly, the district court properly rejected petitioner's request to give the instruction.

any person who violates subsection (a) of this section shall be sentenced as follows:

* * * * *

(B) In the case of * * * any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than \$15,000, or both.

⁴Petitioner observes (Pet. 6) that in *United States v. Moore, supra*, 423 U.S. at 135-137, the Court reserved the question whether a physician could be prosecuted under 21 U.S.C. 842 for having

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1978

violated the provisions of 21 U.S.C. 829 with respect to the issuing of prescriptions. But even if petitioner could have been charged under Section 842, that would suggest only that Sections 841 and 842 overlap to some extent, not that one crime is a lesser-included offense of the other. In such circumstances, the government has discretion to choose which statute to use. See *United States v. Bishop, supra*, 412 U.S. at 361; *United States v. Beacon Brass Co.*, 344 U.S. 43, 45 (1952).